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No. 89-436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v--

Independent School District No. 622,

Respondent.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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APPENDIX

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Petitioner Keene Corporation ("Keene") submits this reply brief in further support of its petition for a writ of certiorari granting review of a Minnesota State Court decision requiring Keene to produce documents in state court litigation that are absolutely privileged and that are also under federal court seal. Respondent Independent School

District No. 622 ("Respondent") incorrectly contends that Keene failed to preserve its due process claim and that there is no need for this Court to review what Respondent mischaracterizes as an interlocutory discovery dispute in state court. Keene did raise and preserve both its supremacy clause claim and its due process claim. Moreover, the issue presented is whether a state court can order a party to produce documents disclosing attorney-client and work product privileges, particularly when many of such documents were created in reliance on a federal court protective order and when the ordered disclosure would violate that party's constitutional right to effective counsel.

The order at issue directed Keene to produce "any and all documents, exhibits

or depositions utilized by any party in the case of Keene Corporation v Insurance Company of North America" ("the INA case"). See App. A. In the INA case, Keene had sought insurance coverage for asbestos-related cases. During the damage phase of that litigation, Keene had to explain and justify the steps taken by its defense counsel in its national defense of those cases. Keene remains a defendant in asbestos cases. Production of such material to an insurance carrier, which had already been held liable for coverage, did not waive the attorney-client or work product privileges because the policy holder and the insurance carrier then had a common interest. See, e.g., Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 936-37 (D.C. Cir. 1984). The

federal court signed a protective order, placing the material produced in the damage phase under seal and limiting the use of that material to the conduct of the INA case. In reliance on that federal protective order, Keene produced correspondence among its defense counsel and permitted certain lawyers and a paralegal to be deposed on trial and litigation strategy. It is the application of the state court's order to that absolutely privileged material that caused Keene to file this petition.

Keene maintains that its constitutional right to effective counsel and access to the courts will be irreparably harmed if Keene is forced to disclose its trial and litigation tactics as required by the state court order. Keene also maintains that the state court order compels it to

violate a federal order and that the consequence of such a violation will be to seriously affect the ability of federal courts to obtain evidence in future cases.[1]

Keene told the state courts that court ordered production of the documents at issue, which disclosed attorney-client and work product privileges, would violate Keene's constitutional right to effective counsel and access to the courts. At the trial level Keene told the Court:

> The release of this information would deprive Keene Corporation of its rights to an adequate and true defense under the Minnesota and

[1] Keene seeks relief from this Court in light of the statements by the federal district court for the State of Minnesota, which dismissed a civil rights action by Keene, in part, in reliance upon Keene's right to petition this Court for relief.

United States Constitutions. See App. J.

Keene repeated its constitutional due process claim to the Minnesota Court of Appeals. See App. G-4. Having stated "the claim of invalidity and the ground therefor" to the state courts, Keene properly presented the federal question below and this Court has the jurisdictional powers to review that decision. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

The state court's discovery order that Keene produce these privileged documents "is a final judgment for purposes of [this Court's] jurisdiction, since it involved a right 'separable from, and collateral to' the merits." National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977), citing Cohen v. Beneficial Loan Corp., 337 U.S.

541, 544 (1949). Resolution of the matters raised by Keene in this petition are collateral to and will not affect the merits in the underlying state court proceeding.

More importantly, if Keene is not granted federal review it will irreparably lose any remedy for the deprivation of its constitutional rights. The judicial process cannot repair the damage done once privileged material is disclosed. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3rd Cir. 1984) (compliance with a disclosure order destroys the right to be protected). Keene has asked the highest state court to protect its constitutional right to counsel and been rebuffed. The irreparable harm it will suffer will occur when the material is produced and

will not be dependant upon the ultimate result of the state court litigation. Accordingly, this Court has the power to review that decision now. - Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Cohen v. Beneficial Life, 337 U.S. at 546.

Keene is arguing that the privileged status of information contained in the documents it has been ordered to produce is the reason that compelled production of these documents will violate its constitutional right to counsel. The state court order directs Keene to provide its defense strategy in asbestos cases to this asbestos plaintiff, effectively destroying Keene's constitutional right to counsel. If need be, this Court can review the evidence in the state court record to determine if the documents are privileged, since the

conclusion of law as to a federal right and the findings of fact are so intermingled. See Fiske v. Kansas, 274 U.S. 380, 385 (1927). Indeed, this Court has said:

> [w]hen the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained.

Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945), overruled on other grounds, Limbach v. Hooven & Allison Co., 466 U.S. 353, 361 (1984). A finding as to whether or not the documents at issue disclosed privileged information is similarly determinative of whether the

state court order compelling their production violates Keene's due process rights. Moreover, the uncontroverted evidence below established that the contents of the documents contain privileged information.

Thus, Keene told the state trial court that the INA case focused on the nature and quality of Keene's defense in asbestos cases. See App. F. Keene also told that court that a deposition transcript ordered produced "discussed details of the management and adequacy of Keene's defense in asbestos-related litigation" and that the documents made exhibits to that deposition "consist almost exclusively of memoranda and correspondence among Keene, the attorneys defending Keene, and Keene's insurers, related to the handling of Keene's

defense in asbestos-related litigation." See App. I. Keene also stated that it would not have permitted the deposition to occur but for the federal court order and that defense counsel for Keene believes that disclosure of this information related to the nature of Keene's defense would impair counsel's efforts to defend Keene. See App. J.

Respondent never contested the validity of the privilege claims asserted by Keene. Nor did Respondent suggest that the privilege had been waived. Instead, in opposing Keene's writ to the Minnesota Court of Appeals, Respondents merely argued that compelled production of these privileged documents would not violate the federal court order because Respondent sought copies of the sealed documents from Keene. See App. K. But,

Keene never argued that those documents, or any documents, became privileged when they were produced pursuant to the protective order.[2] Rather Keene is arguing that the documents are privileged based on the attorney-client and work product material they disclose. This conforms to the terms of the federal protective order provision, which state that the documents govern questions of privilege.

Thus, the evidence in the record shows that Keene established that the documents it has been ordered to produce disclose confidential attorney-client

[2] The protective order permitted the documents to be produced without losing their privileged status, and in reliance on that protective order Keene permitted its counsel to be deposed, thus creating additional privileged and confidential documents.

communications and counsel's trial preparation materials. Accordingly that order violates Keene's constitutional due process right, as a civil litigant, to the assistance of counsel. See Maness v. Meyers, 419 U.S. 449, 471-72 (1975) (Stewart, J., concurring); Powell v. State of Alabama, 287 U.S. 45, 69 (1932).

The right to counsel in civil cases rests on the principle that, without the assistance of counsel, the constitutional guarantee of a fair hearing may be rendered meaningless. See Powell v. Alabama, 287 U.S. at 68. See also Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (right to be heard of little avail if it does not comprehend right to be heard by counsel).

The order which demands the production of these materials is tantamount to

compelling an attorney to testify as to how the attorney prepared the case. The subject of the depositions at issue is the handling of Keene's defense in asbestos related litigation. The witnesses discuss communications between Keene and its counsel, communications among counsel, defense strategy sessions and the role of Keene's national defense counsel, including the organization and handling of the many asbestos cases, case evaluations and settlement negotiations. The protection of the matters addressed in the coverage action depositions from discovery by adverse parties is at the heart of the attorney-client privilege and the attorney work-product doctrine. If Keene's confidences and its attorneys' strategy discussions were subject to discovery by adverse parties in the many

asbestos cases, counsel could not possibly provide effective representation to its clients. Similarly, if the coverage action materials at issue here are to be produced to plaintiffs in the underlying cases, Keene faces a draconian choice: it can either abandon its efforts to obtain insurance coverage and the means to pay for its defense in the underlying tort cases, or it can risk rendering its defense attorneys impotent by publishing through public discovery their communications, strategies and thought processes.

Respondent's attempt to obtain privileged documents also constitutes an impermissible interference with Keene's constitutional right of access to the courts. The right of access to the courts is based in the due process

clause. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983). It is basic to our system of government and is one of the fundamental rights protected by the Constitution. Id. at 971. This court has characterized this right in the following language:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907). Consequently, this right is deserving of "rigorous protection." Martin v. Lauer, 686 F.2d 24, 33 (D.C. Cir. 1982).

A mere formal right of access to the courts does not pass constitutional muster. Id. Courts require that the

access be "adequate, effective, and meaningful." Bounds v. Smith, 430 U.S. 817, 822 (1977).

Keene also maintains that production of these privileged documents will cause it to violate the federal order. The federal court issued an order limiting use of information obtained by discovery to the conduct of that case. In reliance on that order, Keene produced privileged documents and permitted its counsel to reveal trial strategy at deposition, thus creating deposition transcripts of privileged material which would not have existed but for the protective order. The federal court recently refused to lift the seal on these materials. See App. I. Even if the seal were lifted they would remain privileged. The state court order directs Keene to give this

privileged and sealed material to Respondent for a use not contemplated by the federal order. If a state court may rip the federal seal off material produced in reliance on a federal order, then federal courts will not be able to obtain evidence in future cases by offering a protective order.

Federal courts have a vital interest in the enforceability of protective orders, because witnesses will be inhibited from giving vital evidence if they believe the orders will not be enforced. See Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 295-96 (2d Cir. 1979). The state court order directs Keene to produce to Respondent depositions created in reliance on the Federal protective order. Such an order directly affects the power of federal

courts to control the evidence available to them and, as such, is an impermissible intrusion into the federal court jurisdiction.

CONCLUSION

For the reasons set forth herein, and in the prior petition, Petitioner Keene prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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STATE OF MINNESOTA DISTRICT COURT
COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622,

Plaintiff,

File No. C5841701

Property Damage

vs.

Bor-Son Construction, Inc.; and Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

KEENE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Keene Corporation ("Keene") brings this motion for a protective order against a set of burdensome and inappropriate discovery requests served by plaintiff. Plaintiff served seven notices of deposition on or about December 20, 1988. These notices purported to require Keene to produce witnesses and documents on three days' notice and to produce large numbers of documents that have previously been produced or made available to plaintiff's counsel. All of the discovery requests essentially duplicate requests previously served and responded to in this litigation. In addition to five depositions of Keene noticed as "Rule 30(b)(6)" depositions under the

Federal Rules of Civil Procedure[sic],[1] plaintiff noticed the deposition of David Rehbein, a legal assistant employed by Keene's national defense counsel. Each of these deposition notices was accompanied by a request for production of documents similarly purporting to require Keene to produce voluminous records on three-days' notice. All of these deposition notices should be quashed and a protective order should be entered preventing the taking of these depositions.

Plaintiff has also noticed the deposition of Harry Wilson. Wilson is a former employee of a former subsidiary of

[1]Keene assumes these notices all intend to invoke Rule 30.02(6) of the Minnesota Rules of Civil Procedure, renumbered by amendment effective January 1, 1989, to Rule 30.02(f). Throughout this brief, Keene will simply refer to this rule as Minn. R. Civ. P. 30.02(f).

Keene, and is not under Keene's control and Keene cannot produce him for his deposition.

Keene has agreed to produce a witness to testify regarding the document center maintained by Keene. This deposition should be unnecessary, however, for Plaintiff's counsel has previously deposed Howard Mileaf, Keene's Vice President, Corporate Secretary, General Counsel and custodian of records. Mr. Mileaf would be the witness Keene would designate to testify on this subject.[2]

FACTUAL BACKGROUND

Keene has never mined asbestos, nor manufactured, processed, fabricated,

[2]Mr. Mileaf was deposed by plaintiff's counsel in University of South Carolina v. W.R. Grace & Co., et. al., Court of Common Pleas, Richland County, South Carolina, on March 13, 1987.

sold, distributed or otherwise placed into commerce thermal insulation or acoustical products containing asbestos. A former subsidiary of Keene, Keene Building Products Corporation ("KBPC"), and KBPC's corporate predecessors, Baldwin-Ehret-Hill, Inc. ("BEH"), a Pennsylvania corporation, Ehret Magnesia Manufacturing Company ("Ehret"), a Pennsylvania corporation, and Baldwin-Hill Company ("B-H"), a New Jersey corporation, did at one time manufacture and sell thermal insulation or acoustical products containing asbestos. Keene expressly denies that it is the successor to the unknown and unforeseen contingent tort, contractual, or other liabilities of KBPC, BEH, and BEH's corporate predecessors.

Many of the facts underlying this discovery dispute have been before the Court on prior occasions. Virtually all of the current requests have been the subject of previous requests. The chart appended to this brief as Appendix A catalogs these previous requests. Plaintiff's attempts to renew these requests again by requests which are untimely under the final discovery cutoff in the litigation should be rejected. Plaintiff seeks to impose a discovery burden on Keene that is not only burdensome, but is actually impossible fcr Keene to perform. The bulk of plaintiff's discovery requests are directed to the activities of Keene's former subsidiary or that subsidiary's alleged predecessors. Keene cannot be required to produce a witness to testify

on the various subjects designated by plaintiff in its "30(b)(6)"[sic] deposition notices because Keene does not employ any witness from its former subsidiary who can so testify.

ARGUMENT

I. THIS COURT MUST SUPPRESS DISCOVERY ON THE INSURANCE COVERAGE DISPUTE.

Plaintiff's discovery requests are directed, in large part, to discover information from a discovery dispute between Keene and its liability insurers relating to coverage for certain personal injury claims. That action is pending in the United States District Court for the District of Columbia, and the various records and testimony plaintiff now seeks were placed under seal by that court. The protective order sealing these records, dated March 30, 1984, is

attached to the Affidavit of Mary R. Vasaly as Exhibit A.

This Court should grant Keene a protective order against the discovery of information relating to the insurance coverage issues for the following reasons:

(a) The information sought is subject to the federal court's seal, and plaintiff should go to that Court if it wants relief from the order;

(b) The information sought by plaintiff is in any event subject to attorney work product immunity and the attorney-client privilege;

(c) Keene relied on the federal court's protective order when it allowed depositions to proceed which addressed attorney-client communications and attorney work product information and

documents; had there been no protective order, Keene would have asserted its privileges to prevent these depositions from proceeding;

(d) The information sought by plaintiff relates solely to Keene's bad faith claims against its insurers in the federal court action and have no bearing on the facts relevant to plaintiff's claims against Keene in this action; and

(e) The Minnesota Rules of Civil Procedure do not allow discovery of the information sought by plaintiff.

Keene filed its insurance coverage action in June of 1978. Insofar as Keene is concerned, the action was substantially resolved by the May 13, 1983, decision of the federal court. Keene Corp. v. Insurance Co. of N. Am., No. 78-1011-JLG, slip op. (D.D.C.

May 13, 1983). That decision is Exhibit B to the Affidavit of Mary R. Vasaly. Keene's claims for punitive damages based on bad faith were resolved in 1984, by settlement, on the eve of trial.

Plaintiff's attempt to obtain access to documents relating to the federal court litigation should be addressed to the federal court. Plaintiff is undoubtedly seeking to "end run" the federal court judge because of that judge's recent ruling declining to modify the protective order to allow discovery of materials in the insurance coverage action for use in personal injury cases. Indeed, the first request for these materials in this litigation came three weeks after the entry of that order, and after this

action had been pending for years.[3] This court should not provide a forum to plaintiff and its counsel to seek a more favorable ruling. It is entirely proper to require plaintiff to seek relief from the federal court in Washington. In her July 8, 1988, decision, Judge Green implicitly acknowledges that she would entertain a request to intervene to have the question of non-parties' rights to access to the documents decided.

Solely in connection with Keene's claims for punitive damages for bad faith, Mr. David Rehbein was deposed by the insurers

[3]Plaintiff served interrogatories and requests for production of documents on or about July 31, 1988, seeking much of the information now sought by "30(b)(6)" deposition notice and accompanying Rule 34 requests for production of documents. Those requests were timely responded to by Keene. The requests and responses are attached to the Affidavit of Mary M. Vasaly as Exhibits G, H, I & J.

in August and September 1984. At the time of his deposition, Mr. Rehbein was (and still is) employed by Anderson Russell Kill & Olick (hereafter "ARKO"). See the Affidavit of Howard A. Mileaf filed in the federal court action (hereafter "Mileaf Aff." at ¶ 6), attached as Exhibit E to the Affidavit of Mary A. Vasaly. ARKO served (and still serves) as Keene's national defense counsel in asbestos-related litigation, and Mr. Rehbein's duties at ARKO have consisted largely of acting as the administrator for the defense of the asbestos-related litigation involving Keene. Mileaf Aff. at ¶ 6. At his deposition, Mr. Rehbein discussed details of the management and adequacy of Keene's defense in asbestos-related litigation. Mileaf Aff. at ¶ 6. Thus, Mr. Rehbein's

deposition testimony concerns absolutely privileged matters concerning Keene's defenses against suits such as this, which plaintiff has no right to discover under the Minnesota Rules of Civil Procedure.[4] This discovery can only be viewed as harassment.

Similarly, the documents which were made exhibits to Mr. Rehbein's deposition consist almost exclusively of memoranda and correspondence among Keene, the attorneys defending Keene, and Keene's insurers, related to the handling of Keene's defense in the asbestos-related

[4]Minnesota provides for only limited discovery of information relating to insurance coverage. Under Minn. R. Civ. P. 26.02(2), plaintiff is entitled to know the limits of insurance coverage. Here, nothing but the result of the federal court litigation--the adjudication that Keene is entitled to insurance coverage under various policies--is germane or relevant in any way to the issue for which this limited discovery is allowed.

litigation. Mileaf Aff. at ¶ 7. Accordingly, these documents are protected from disclosure by the attorney-client privilege and work product immunity. Further, these documents were generated many years after the period when Keene's former subsidiary, KBPC, manufactured products containing asbestos. These documents never were part of the business records of Keene or KBPC. Mileaf Aff. at ¶ 7.

Additionally, Keene would not have allowed Mr. Rehbein to provide testimony concerning privileged communications and documents, without securing the protective order that plaintiff now seeks to have lifted. See Mileaf Aff. at ¶ 8. It was only because of the nature of Keene's claims in the insurance coverage litigation, and the acknowledgement by

all parties and the presiding judge in that case that the information to be disclosed would be kept in strict confidence, that Keene allowed Mr. Rehbein to testify. Keene relied on the protective order and is entitled to its protection. Counsel defending Keene in asbestos-related litigation believes that any revelation of information related to the nature of Keene's defense would impair counsel's efforts to defend Keene. See Affidavit of David F. Herr (copy attached as Exhibit F to the Affidavit of Mary R. Vasaly).

A. The Documents and Deposition Testimony Sought Are Privileged Because They Are Attorney Work Product and Are Protected by the Attorney-Client Privilege

The March 30, 1984, protective order entered by the federal court allowed the exchange of documents and information between Keene and its insurers which otherwise are protected from disclosure by the work-product doctrine and the attorney-client privilege. This information and these documents simply are not properly subject to discovery by plaintiff under Rule 26.02 of the Minnesota Rules of Civil Procedure.

Plaintiff seeks to depose Mr. Rehbein about his prior sealed deposition and to examine the documents which were made exhibits to Mr. Rehbein's testimony in that sealed deposition. This discovery must be denied because of the court order

sealing the material and because the information sought addresses the management and details of Keene's defense in the underlying personal injury asbestos-related litigation, including cases such as this one. Specifically, these documents concern the mental impressions of the attorneys defending Keene. Plaintiff's request to depose Mr. Rehbein and to obtain information about the Coverage Action is an unprecedented and flagrant attempt to invade Keene's attorney-client privilege and to obtain work-product and trial preparation materials.

Moreover, as a member of Keene's litigation team employed by Keene's counsel, Mr. Rehbein may not be deposed by Keene's litigation adversaries, absent

Keene's consent.[5] Keene does not consent. In N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83 (M.D.N.C. 1987), the court granted an order preventing the deposition of a party's attorney. Because of the risk of disruption and controversy over issues of attorney-client privilege and work product, the court found that "the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed. R. Civ. P., protective order unless the party seeking the deposition can show both the propriety and need for the deposition." 117 F.R.D.

[5]The protections afforded by the attorney-client privilege and the attorney work product doctrine are not lost over time, and remain applicable in subsequent litigation. See Carey Canada, Inc. v. California Union Ins. Co., 118 F.R.D. 242, 246-47 (D.D.C. 1986), citing Federal Trade Comm'n v. Grolier, 462 U.S. 19, 25 (1983).

at 85. The plaintiff can show neither in this case, and Keene is accordingly entitled to the protective relief it seeks.

Where documents and information relating to a policyholder's defense in claims against it are disclosed by a policyholder to its insurers, they are disclosed based on the common interest of the policyholder and its insurers in the defense of underlying claims against the policyholder. Here, plaintiff is not even the underlying tort claimant involved in that coverage litigation, so its interest in the material sought is even more remote. See, e.g., Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 936-37 (D.C. Cir. 1984); see also Car & Gen'l Ins. Co. v. Goldstein, 179 F. Supp. 888, 891

(S.D.N.Y. 1959), aff'd, 277 F.2d 162 (2d Cir. 1960), where the court stated that "the insurance company and insured have a common interest in the defense of suits against the insured."

Thus, a policyholder's disclosure to its insurers of privileged documents and information does not vitiate attorney work product immunity and the attorney-client privilege as to underlying tort claimants, such as plaintiff. See Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986), where the court stated that documents relating to the policyholder's defense in underlying claims which were discoverable by the policyholder's insurers nonetheless could retain their status as documents privileged from discovery by underlying

tort claimants. See also United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1300-01 (D.C. Cir. 1980). In that case, the Circuit Court for the District of Columbia vacated an order allowing discovery of documents protected by attorney work product immunity, which had been shared by the party claiming protection with a party that had common interests. Since Mr. Rehbein was and is an employee of Keene's national defense counsel who has been intimately involved in the management of Keene's defense in asbestos litigation, his deposition testimony, and the exhibits thereto, are privileged from disclosure based on attorney work product immunity and the attorney-client privilege.

B. Keene Relied on a Protective Order in Allowing Mr. Rehbein to be Deposed

As set forth above, Mr. Rehbein is an ARKO employee intimately involved in assisting Keene's attorneys in Keene's defense of asbestos-related litigation. See Mileaf Aff. at ¶ 6. As also shown, Keene would not have allowed Mr. Rehbein to testify concerning the conduct of Keene's defense and to produce the subject documents, absent a protective order covering his deposition and the exhibits to it. Mileaf Aff. at ¶ 8. Keene's justifiable reliance on the protective order in allowing Mr. Rehbein to testify as he did provides even more support for denying plaintiff's motion. See, e.g., Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658 (D.D.C. 1986) ("Tavoulareas").

In Tavoulareas, the defendant sought to lift a protective order pursuant to which

it had received voluminous discovery, without objection. In denying the motion with respect to documents not made a part of the public record at trial, the Tavoulareas court emphasized the fact that much of the discovery sought to be unsealed had been provided in reliance on the protective order:

> The Court must consider the fact that Mobil's cooperation in this process was obtained in reliance upon the blanket protective order, which included a requirement that the information be used only in preparation for litigation.

111 F.R.D. at 658-59. The Court found such reliance to be a "significant factor in determining whether to lift a seal on discovery materials." Id. at 659 (citations omitted). See also Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 295 (9th Cir. 1979), where the

court stated:

> Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.[6]

This point also is demonstrated by H.L. Hayden Co. of N.Y. v. Siemen Med'l Sys., Inc., 106 F.R.D. 551 (S.D.N.Y.), aff'd in part and dismissed in part, 797 F.2d 85 (2d Cir. 1985) ("Hayden"). In Hayden, the court denied a motion to modify a protective order, on multiple grounds,

[6]Martindell distinguished Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326 (9th Cir. 1977), which vacated a lower court judgment rendered on a motion made by nonparties who had not expressly been granted leave to intervene, based on the fact that the party who might have opposed the nonparties' motion in Spangler had not had the opportunity to oppose the motion.

one of which was the parties' reliance on the order:

> The defendants' reliance on the protective order is also significant. The defendants proceeded with discovery under the expectation that the materials they disclosed would be used only for purposes of this lawsuit. The protective order facilitated a discovery process which the plaintiffs in their papers have described as 'extensive and painstaking.' The order was utilized to secure 'the just, speedy, and inexpensive determination,' Fed. R. Civ. P. 1, of an expensive, protracted and often bitter dispute.

Id. at 556. The federal court issuing the protective order recognized the importance of Keene's right to confidentiality in denying the motion to modify the protective order brought last summer. Keene's reliance on the protective order in allowing Mr. Rehbein

to testify requires this court to deny plaintiff the discovery it now seeks.

C. The Deposition Testimony and Documents Sought Have No Bearing on Plaintiff's Claims

None of the issues to be litigated in this case is the same as any issue in the insurance coverage litigation. The deposition testimony and documents sought simply have no bearing on this action.

As stated above, this action is a product liability action for property damage relating to an alleged thermal insulation product containing asbestos. The action in which the information sought by plaintiff was produced, by contrast, involved Keene's efforts to force insurance companies to honor their insurance contract obligations and for breach of their duties. That coverage

action was not even filed until 1978--long after Keene's former subsidiary had ceased manufacturing products that contained asbestos. The information plaintiff seeks addresses the bad faith of Keene's insurers and the handling and adequacy of Keene's defense in asbestos-related litigation; it does not address issues to be proved in this action. Thus, the documents and evidence which plaintiff seeks are neither necessary nor relevant to the points which plaintiff would need to make to prevail in this action.

* * *

Dated: January 5, 1989.

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND

By /s/ Mary R. Vasaly
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ATTORNEYS FOR DEFENDANT
KEENE CORPORATION

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622,

Plaintiff,

vs.

Bor-Son Construction, Inc.; and Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

File No. C5841701

Property Damage

AFFIDAVIT OF DAVID F. HERR RELATING TO MOTION FOR PROTECTIVE ORDER

STATE OF HAWAII)
)ss.
COUNTY AND CITY OF HONOLULU)

David F. Herr, being first duly on oath sworn, deposes and states that:

1. I am an attorney at law and a partner in the Minneapolis law firm of Maslon Edelman Borman & Brand. I am one of the attorneys for defendant Keene Corporation in this action.

2. I am informed and believe that the action Keene Corporation vs. Insurance Corporation of North America, Civil Action No. 78-1011, United States District Court for the District of Columbia ("Coverage Action") is an action to determine the existence and extent of liability insurance coverage for Keene Corporation for asbestos-related claims. I further understand that David Rehbein, a legal assistant with Keene's national

defense counsel, was deposed in the Coverage Action, that his deposition was sealed by Order of the Court, and that the previously-sealed deposition of David Rehbein may contain information concerning the nature of the defense strategy of Keene Corporation, the mental impressions of Keene Corporation's counsel, and other privileged information.

4. To allow plaintiff in this action to obtain such information, other sealed information, or to depose Mr. Rehbein to obtain substantially the same information would substantially impair my efforts in defending Keene Corporation in this action and it other cases. The release of this information would deprive Keene Corporation of its rights to an adequate and true defense under the Minnesota and

United States Constitutions. The disclosure of this type of information would undermine my effectiveness in defending Keene Corporation and would make it more difficult for me to provide the defense Keene Corporation is entitled to.

Further your affiant sayeth naught.

/s/ David F. Herr
David F. Herr

Subscribed and sworn to before me this 5th day of January, 1989.

/s/
Notary Public, State of Hawaii

My Commission expires: 2/18/89

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

ASBESTOS/PRODUCT LIABILITY

Independent School District No. 622,

File No.: C5-84-1701

Plaintiff,

vs.

MEMORANDUM IN OPPOSITION KEENE'S PETITION FOR WRIT OF PROHIBITION

Bor-Son Construction, Inc., Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company, and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff

vs.

Corwin, Seppanan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA

Respondent, Independent School District No. 622 (the "School District"), submits this memorandum in opposition to defendant Keene's Petition for a Writ of Prohibition in order to restrain enforcement of a Washington County District Court Order dated February 1, 1989.

* * *

It is clear from the facts that Keene's true objection is that it does not wish to allow the School District to make use of the labors of the government in order to make meaningful discovery in this case possible. It is undisputed that the School District could obtain copies of those exact documents so long as it would

find them through its own efforts at Keene's record center. Keene's objection was appropriately stricken by the Trial Court.

2. Documents produced in the case of Keene Corporation v. Insurance Co. of North America, C.A. No. 78-1011 D.C.

Similar to the Government litigation, Keene has been involved in litigation with its insurer over whether it should afford coverage for asbestos claims. The insurer has denied coverage, asserting among other things, that Keene was insuring a known liability and knew at the time that it would be collecting on the policies. Once again, the case involves issues such as Keene's knowledge, concealment, state of the art, etc. While certain documents in that case are under seal (and are not sought

by the School District), Keene's national counsel has a personal copy of a full transcript of the proceedings in his office which is by no means under seal (see page 15, infra). Further, to the extent the documents produced by Keene in the insurance litigation came from the record center, Keene is not prevented in any way from disclosing them. The Court did not order production of any materials which are under seal, and properly rejected Keene's objections.

3. Documents previously produced to plaintiff's counsel for inspection at the record center.

In September, 1987, School District counsel went to Keene's record center with the purpose of reviewing sales records and other limited types of

documents. Plaintiff's counsel was not permitted to

* * *

Dated: March 9, 1989.

Respectfully submitted,

HERTOGS, FLUEGEL, SIEBEN, POLK, JONES & LaVERDIERE, P.A.

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